

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR08-321

JOE RICHARDSON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered NOVEMBER 19, 2008

APPEAL FROM THE SALINE
COUNTY CIRCUIT COURT,
[NO. CR-2007-234-3]

HONORABLE GRISHAM A.
PHILLIPS, JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Joe Richardson appeals his November 16, 2007 conviction by a Saline County jury on a charge of rape, for which he was sentenced as a habitual offender to thirty years in the Arkansas Department of Correction. On appeal, he argues that the circuit court erred in denying his motions for (1) a directed verdict; (2) a mistrial; and (3) a limitation of the scope of Arkansas Rule of Evidence 404(b). We affirm.

Appellant was charged with raping his stepdaughter, K.M., D/O/B June 21, 1991, after allegations were made that he had engaged in sexual conduct with her on an almost weekly basis for nearly two years, beginning when she was fourteen years of age. The conduct included sexual touching; his masturbating while standing by her bedside at night; making her masturbate him with her hands; frottage from the back while he bent her over a bed; and penetrating her vagina with his tongue and his finger.

At trial, the State presented testimony from K.M., who testified as to the allegations of sexual abuse as set forth above, that specifically included appellant penetrating her vagina with his tongue and with his finger. Just after her testimony concluded, the circuit court recessed for a lunch break. When court was called back into session, one juror was late returning, and she apparently saw appellant being led back into the courtroom in handcuffs. Appellant's counsel moved for a mistrial, which the circuit court denied. The circuit judge did speak to the juror about the incident outside the presence of the other jurors and explained to her that what occurred is common practice as defendants are considered to be in custody as of the time the trial begins. The witness was instructed that the handcuffs had no bearing on appellant's innocence or guilt and that she should not share the information with the other jurors.

The next witness to testify for the State was the victim's mother, Lisa Bonner. Ms. Bonner, who was divorced from appellant by the time of the trial, testified that around 4:30 a.m. on February 12, 2007, she discovered appellant in K.M.'s bedroom masturbating as he stood by her bed. She also testified as to their sexual history, which included behavior similar to what she witnessed in her daughter's room that night.

Additional testimony was presented by S.H., whose mother had previously been married to appellant. She testified that, from the time she was approximately five years old until she reached the age of fourteen, appellant engaged in sexual activities with her similar to those testified to by K.M., as well as anal and vaginal penetration with his penis and making her perform oral sex on him. Appellant was never tried on related charges, and S.H.

explained that she had recanted her allegations although they had, in fact, occurred. During S.H.'s testimony, appellant objected that her testimony went beyond the scope of what is anticipated with the "pedophile exception" to Rule 404(b) of the Arkansas Rules of Evidence and moved for a limitation of the scope of the testimony. The motion was denied.

After the State rested its case in chief, appellant's counsel moved for a directed verdict, stating, "Your Honor, I have the standard motion for directed verdict on the grounds that the evidence of rape is insufficient to be submitted to the jury." Appellant's counsel also renewed his motion for a mistrial. The circuit court denied both motions.

Appellant then testified on his own behalf, at which time he denied the allegations and offered possible explanations of why K.M. and her mother might have falsely accused him. He also acknowledged at least two other convictions on other, non-sexual, charges. At the close of appellant's testimony, his attorney renewed his motion for directed verdict "on the specific allegation that the State failed to submit sufficient proof upon which the case should be submitted to the jury," and also renewed his motion for a mistrial. The circuit court again denied both motions.

The State then called rebuttal witness, Latisha Franks, another of appellant's ex-wives and the mother of two of his children. After the State rested in the rebuttal phase, appellant's counsel renewed all of his motions, "the motion for directed verdict on the grounds the evidence is insufficient to have the case submitted to the jury," and the motion for mistrial. The circuit court again denied the motions, and the jury returned a guilty verdict and recommended a sentence of thirty years. The circuit court so sentenced appellant, as

evidenced by the judgment and commitment order entered on November 16, 2007, and appellant filed a timely notice of appeal on December 12, 2007.

1. *Denial of Motion for Directed Verdict*

We first consider whether this issue is preserved for appeal. Arkansas Rule of Criminal Procedure 33.1(b) provides that in a jury trial a motion for a directed verdict must be made at the close of all of the evidence. If a motion is made at the conclusion of the State's evidence, then it must be renewed at the close of all of the evidence. Rule 33.1(c) further provides that the failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict. Ark. R. Crim. P. 33.1(c). Appellant moved for a directed verdict at the close of the State's case in chief, and that motion was denied. He properly renewed his motion at the close of his case, as well as at the close of the State's rebuttal witness testimony. Accordingly, he made the motions at the proper time; however, the inquiry does not end there.

A directed-verdict motion is a challenge to the sufficiency of the evidence and requires the movant to apprise the trial court of the specific basis on which the motion is made. *Tryon v. State*, 371 Ark. 25, 263 S.W.3d 475 (2007). When a motion for a directed verdict does not identify particular or specific elements of proof that are missing from the State's case, the motion fails to properly apprise the trial court of the asserted error. *See id.* A directed verdict motion must be a specific motion in order to apprise the trial court of the particular point raised, since when specific grounds are stated and the absent proof is pinpointed, the trial court

can either grant the motion, or, if justice requires, allow the State to reopen its case and supply the missing proof. *Tester v. State*, 342 Ark. 549, 30 S.W.3d 99 (2000). The movant is then bound by the scope and nature of the objections and arguments presented at trial. *Id.* As our supreme court has explained, the preservation of a challenge to the sufficiency of the evidence is dependent on the defendant making the specific challenge to the trial court that he seeks to make on appeal. *E.g. Conner v. State*, 334 Ark. 457, 982 S.W.2d 655 (1998).

The State contends, and we agree, that appellant's motion for directed verdict and the renewals thereof were not sufficiently specific to satisfy the requirements of Arkansas Rule of Criminal Procedure 33.1(c). The rule is strictly construed requiring not only a timely motion, but also a statement specific enough to show how the proof was insufficient so that the State may be allowed an opportunity to reopen its case and present the missing proof. *See Eastin v. State*, 370 Ark. 10, 257 S.W.3d 58 (2007). Appellant made no such motion, but rather generally alleged that the proof was insufficient to go to the jury. Because appellant failed to make a sufficiently specific motion, we hold that this issue is not preserved for our review and affirm on that basis.

2. Denial of Motion for Mistrial

A mistrial is a drastic remedy and should be declared when there has been an error so prejudicial that justice cannot be served by continuing the trial, or when it cannot be cured by an instruction or admonition. *See Holsombach v. State*, 368 Ark. 415, 246 S.W.3d 871 (2007). The trial court has wide discretion in granting or denying a motion for mistrial, and, absent a showing of abuse of that discretion or manifest injustice, its decision will not be

disturbed on appeal. *See Tryon, supra*. It is not prejudicial per se for a defendant to be brought into court handcuffed, and the defendant must affirmatively demonstrate prejudice. *Breedlove v. State*, 62 Ark. App. 219, 970 S.W.2d 313 (1998).

As previously stated, one of the jurors was late returning to the courtroom after a short recess. At that time, she saw appellant in handcuffs as he was led down the hall by an officer. The juror was brought before the judge, who explained that once a trial begins, all defendants are considered to be in custody, which explained why appellant was in handcuffs. She was admonished not to share what she had seen with the other jurors. Appellant's attorney moved for the court to declare a mistrial at that time and renewed the motion at the close of the State's case in chief, at the conclusion of the evidence, and once again before jury instructions were given. The circuit court denied all the motions.

Appellant cites *Meny v. State*, 314 Ark. 158, 861 S.W.2d 303 (1993), in which our supreme court held that the defendant was not prejudiced by a momentary and inadvertent encounter with potential jurors while he was in handcuffs. Appellant attempts to distinguish *Meny*, because here, he was observed in handcuffs by an actual juror who had heard the alleged victim's testimony just prior to the recess. Although his counsel had conducted cross-examination prior to the recess, he had not yet called any witnesses. He maintains that the State had an advantage in the trial in presenting its evidence. He contends that the combination of K.M.'s testimony followed by the image of the alleged rapist in handcuffs was prejudicial, leaving quite an impact on the juror's judgment.

Appellant further argues that prejudice must be inferred based upon his conviction.

Although he acknowledges that a single juror cannot decide the outcome of a case, appellant asserts that she had a prejudicial impact on the jury's decision, even if she did not communicate the incident to the other jurors. Because of the psychological impact and prejudicial nature of the image of appellant in handcuffs, which was viewed by an *actual* juror, appellant alleges that the circuit court erred in denying his motion for a mistrial.

The State cites *Tryon, supra*, regarding the limited situations in which a mistrial should be declared: (1) when there is error so prejudicial that justice cannot be served by continuing the trial; (2) when it cannot be cured by an instruction to the jury. Restraints are not per se prejudicial, and appellant must affirmatively demonstrate prejudice; this court will not presume prejudice when there is nothing in the record to indicate what impression may have been made on the jurors or where the appellant fails to offer any proof of prejudice. See *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002). Under these standards, the State contends, and we agree, that appellant's argument is without merit.

The State reiterates the circuit judge's explanation and admonition to the juror, and further points out that the juror stated, "I did see him come in, but I didn't notice [the cuffs], I really didn't." The circuit judge went so far as to explain that it was normal for them to use cuffs at that time, and he asked the juror "to not draw any inferences as to his guilt as a result of that," in addition to asking her not to share the information with the other jurors. Counsel on both sides also offered more information, with the prosecutor interjecting that appellant is presumed to be innocent until proven guilty, and defense counsel adding that "[t]hey just don't want a defendant to run off in the middle of a trial is the only reason." The circuit

judge agreed with those statements and stated that the restraints “did not mean a thing.”

Additionally, the State disputes appellant’s reliance on *Meny, supra*, stating that the completion of the voir dire process, being sworn in, and being instructed regarding her duty as a juror prior to seeing appellant in handcuffs left a smaller chance of prejudice than occurred in *Meny*. Regardless, the standard is the same for potential and sitting jurors — appellant must demonstrate that prejudice occurred, and whether it occurred is a matter for the sound discretion of the circuit court. *See Lawson v. State*, 74 Ark. App. 257, 47 S.W.3d 294 (2001).

Appellant failed to demonstrate any prejudice below, and again has failed to do so on appeal. He merely invites the court to infer prejudice from the conviction, which we will not do. *See Williams, supra*. We hold that the circuit court cured any prejudice that might have otherwise occurred with the admonition to the juror.

Finally, the State counters appellant’s contention that prejudice must be inferred by the conviction. Appellant was sentenced to thirty years as a habitual offender who committed a Class Y felony, which was well within the ten-to-sixty years or life sentence that was possible. *See Ark. Code Ann. § 5-4-401 (Repl. 2006); § 5-4-501 (Repl. 2006); and § 5-14-103 (Repl. 2006)*. A defendant who receives a sentence within the statutory range short of the maximum sentence cannot show prejudice from the sentence itself. *See Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002).

3. Denial of Motion to Limit Scope of Ark. R. Evid. 404(b)

Rulings on admissibility of evidence are matters within a circuit court’s discretion, and those rulings are not disturbed on appeal absent a showing of an abuse of that discretion and

prejudice. See *Grant v. State*, 357 Ark. 91, 161 S.W.3d 785 (2004). An abuse of discretion is a high threshold that does not simply require error in the circuit court's decision, but requires that the circuit court acted improvidently, thoughtlessly, or without due consideration. *Id.*

The State initially contends that this argument is not preserved for our review because no contemporaneous objection was made at the first opportunity, which is required to preserve an argument for appeal. See *Ridling v. State*, 360 Ark. 424, 203 S.W.3d 63 (2005). Additionally, the State maintains that appellant attempts to change his argument on appeal, citing *Hunter v. State*, 330 Ark. 198, 952 S.W.2d 145 (1997), which states that issues raised for the first time on appeal will not be considered because the circuit court never had an opportunity to rule on them. See also *London v. State*, 354 Ark. 313, 125 S.W.3d 813 (2003).

Appellant's objection to S.H.'s testimony regarding the alleged sexual abuse she endured while appellant was her stepfather states as follows:

The State's clearly entitled to obtain some form of 404(b) evidence from another victim under the child pedophile exception. I was advised that they would be calling [S.H.]. I don't have an objection to that. I read all the most recent cases on it, so that is allowable, if it's related, if it's similar in nature, if it's not too distant in the past, but there seems to be a level of just general pandering or overemotional content and that's not my understand [sic] of what 404(b) is allowed for. It's my understanding 404(b) is to show a specific pattern, characteristic, trait or specific event, not to go through a victim's entire life story and history for dramatic and emotional impact. So, I'd object to it and ask that it be limited to the scope of what the rule allows.

While appellant argues in his brief that S.H. testified regarding her "acutely feminine clothing" in order to "depict alleged brutality to a young, innocent child," that testimony was not mentioned in the objection. Although those exact words regarding her clothing were not

part of appellant's objection, we hold that the content of his argument, when viewed in its totality, was sufficiently similar to the objection made at trial to preserve the issue for review.

As to the timing concern, the State explains that the objection came several questions after S.H.'s clothing was discussed. The State also questions the timing of appellant's objection regarding S.H.'s testimony about him falling into a more fatherly role and having a more loving, caring attitude after the alleged sexual abuse. That objection was made two questions after the testimony was given and failed to cite this specific testimony as objectionable. While appellant's objections did not immediately follow the questions at issue, the two questions that followed merely requested clarification and further explanation of S.H.'s depiction of appellant's behavior before and after the incidents of abuse. Accordingly, we will address the merits of appellant's argument.

Arkansas Rule of Evidence 404(b) states that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evidence offered under Rule 404(b) must be independently relevant to make the existence of any fact of consequence more or less probable than it would be without the evidence. *Allen v. State*, __ Ark. __, __ S.W.3d __ (Sept. 25, 2008). In other words, the prior bad act must be independently relevant to the main issue, in that it tends to prove some material point rather than merely proving that the defendant is a criminal. *Id.*

Arkansas appellate courts have long recognized a "pedophile exception" to Rule

404(b). *Allen, supra.* We have approved allowing evidence of the defendant's similar acts with the same or other children when it is helpful in showing a proclivity for a specific act with a person or class of persons with whom the defendant has an intimate relationship. *Id.* The rationale for this exception is that such evidence helps to prove the depraved sexual instinct of the accused. *Id.* For the pedophile exception to apply, we require that there be a sufficient degree of similarity between the evidence to be introduced and the sexual conduct of the defendant. *Hamm v. State*, 365 Ark. 647, 232 S.W.3d 463 (2006). We also require that there be an "intimate relationship" between the perpetrator and the victim of the prior act. *Id.*

Rule 404(b), however, makes no distinction between substantiated and unsubstantiated conduct, or between charged and uncharged conduct. Our supreme court has explicitly held that our application of the pedophile exception does not require that the prior act be charged or substantiated. *See Bell v. State*, 371 Ark. 375, 385, ___ S.W.3d ___, ___ (2007).

In *Hernandez v. State*, 331 Ark. 301, 962 S.W.2d 756 (1998), the appellant urged our supreme court to establish parameters for the admission of evidence pursuant to the pedophile exception. The supreme court rejected this argument, holding that Arkansas Rule of Evidence 403 provides the necessary "parameters." In response to an objection that evidence is unfairly prejudicial, the probative value of the evidence must be weighed against the danger of unfair prejudice. *See Tull v. State*, 82 Ark. App. 159, 119 S.W.3d 523 (2003). The standard of review is whether the trial court abused its discretion. *Id.*

The State presented testimony from S.H., who testified regarding sexual abuse inflicted

upon her while appellant was her stepfather. She explained that appellant had been arrested on charges, but that she had recanted the allegations and the charges were dropped. Appellant's attorney objected to the testimony because of its "overly-emotional content." He acknowledged that he expected the testimony under the 404(b) pedophile exception, but he argued that the testimony went beyond the scope of the exception — depicting the witness's entire life story, including descriptions of acutely-feminine clothing ("frilly dress") to depict alleged brutality to a young, innocent child. He also claims that S.H.'s reminiscing about his behavior after alleged sexual acts — that he would fall into a more fatherly role and portray a more loving, caring attitude — was prejudicial because it did not demonstrate a 404(b) pattern, but rather presented an emotional reflection of a little girl yearning for the love of a father figure. He maintains that the prejudicial effect of S.H.'s testimony far outweighed the probative value and should have been excluded, or at least limited, pursuant to Arkansas Rule of Evidence 403.

The State correctly notes that S.H.'s testimony regarding appellant's sexual acts against her are markedly similar to the acts described by the victim in this case, as well as appellant's more recent sexual behavior as described by the victim's mother. *See Flanery v. State*, 362 Ark. 311, 208 S.W.3d 187 (2005) (testimony admissible under the pedophile exception). The State argues, and we agree, that the evidence regarding S.H.'s clothing was properly admitted under Rule 404(b) and the pedophile exception because it established a particular kind of sexual behavior (frottage) that was also inflicted on K.M., and also because it was part of S.H.'s vivid memory of the events she described for the jury.

Likewise, with regard to S.H.'s testimony that appellant was angry and abusive before the sexual assaults but more caring and paternal afterward, the State asserts that the information was relevant to show his intent, plan, motive, preparation, and opportunity, as well as his depraved sexual instinct toward his stepdaughters. The State claims that the testimony showed that appellant used this behavior to manipulate them into "capitulation and secrecy." K.M. testified regarding appellant's typically brutal temper versus his "shushing" her to get her to remain quiet during the sexual abuse and his comments that he "wanted to make [her] feel good[.]" Accordingly, we hold that the testimony was properly admitted pursuant to Rule 404(b) and affirm.

Affirmed.

VAUGHT and HUNT, JJ., agree.